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**California Regional Water Quality Control Board**  
**San Diego Region**

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**Arnold Schwarzenegger**  
*Governor*

June 18, 2008

In reply refer to: Reg.Mes. 342400:fmelbourn

Ms. Marguerite "Peggy" Strand, Esq.  
Best Best & Krieger LLP  
15<sup>th</sup> Floor  
655 West Broadway  
San Diego, California 92101

Dear Ms. Strand:

**ADOPTION OF ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R9-2008-0068  
AGAINST NORTH COUNTY TRANSIT DISTRICT FOR VIOLATIONS AT THE  
SPRINTER RAIL PROJECT**

On June 11, 2008, the California Regional Water Quality Control Board, San Diego Region (Regional Board) adopted Administrative Civil Liability Order No. R9-2008-0068 against North County Transit District (NCTD) assessing civil liability in the amount of \$685,000.

Payment of \$685,000 shall be made payable to the "California State Water Resources Control Board" for deposit into the State Water Pollution Cleanup and Abatement Account and shall be tendered to the Regional Board at the address listed in this letterhead no later than 5:00 p.m. on Friday, July 11, 2008.

Failure to submit payment as required by Order No. R9-2008-0068 may result in the referral of this matter to the Attorney General for further enforcement. The NCTD has thirty (30) days from the date of the Regional Board's adoption of the Order to appeal the action to the State Water Resources Control Board (State Board). Information on the appeal process can be obtained at the following website: [www.waterboards.ca.gov](http://www.waterboards.ca.gov). If NCTD chooses to appeal, payment may be delayed until the State Board has made a determination on the matter.

Please contact Mr. Frank Melbourn of my staff at (858) 467-2973 or by e-mail at [fmelbourn@waterboards.ca.gov](mailto:fmelbourn@waterboards.ca.gov) if you have any questions concerning this matter. The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please

**June 18, 2008**

include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

Respectfully,

John H. Keeler

JOHN H. ROBERTUS  
Executive Officer

JHR:mpm:mja:ftm

Enclosure: ACL Order No. R9-2008-0068

Copies with enclosures to:

1. Don Bullock, NCTD, [dbullock@nctd.org](mailto:dbullock@nctd.org)
2. Paul Cline, [15pta@sbceo.org](mailto:15pta@sbceo.org)
3. Cheryl Filar, City of Escondido, [cfilar@escondido.org](mailto:cfilar@escondido.org)
4. Ken Greenberg, U.S. EPA, Region 9, [greenberg.ken@epa.gov](mailto:greenberg.ken@epa.gov)
5. Karen King, NCTD, [kking@nctd.org](mailto:kking@nctd.org)
6. Mo Lahasie, City of Oceanside, [mlahsae@ci.oceanside.ca.us](mailto:mlahsae@ci.oceanside.ca.us)
7. Thomas Lichterman, NCTD, [tlichterman@nctd.org](mailto:tlichterman@nctd.org)
8. Ken St. Claire, City of San Marcos, [kstclair@ci.san-marcos.ca.us](mailto:kstclair@ci.san-marcos.ca.us)
9. Nadine Scott, [nadia550@sbcglobal.net](mailto:nadia550@sbcglobal.net)
10. Jayne Strommer, City of Vista, [jstrommer@ci.vista.ca.us](mailto:jstrommer@ci.vista.ca.us)
11. Cid Tesoro, County of San Diego, [cid.tesoro@sdcounty.ca.gov](mailto:cid.tesoro@sdcounty.ca.gov)

**ORDER NO. R9-2008-0068  
ADMINISTRATIVE ASSESSMENT OF CIVIL LIABILITY  
AGAINST  
NORTH COUNTY TRANSIT DISTRICT  
SPRINTER RAIL PROJECT  
FOR  
NONCOMPLIANCE WITH WATER CODE § 13376  
AND  
STATE BOARD ORDER NO. 99-08-DWQ**

1. The State Water Resources Control Board (State Board) issued updated statewide general waste discharge requirements for discharges of storm water runoff associated with construction activities involving disturbance of one acre of soil, or more entitled *Order No. 99-08-DWQ, NPDES General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity* (Order No. 99-08-DWQ).
2. The NCTD owns and operates the Sprinter Rail construction site (Site) located along the 22-mile long rail corridor between the Cities of Escondido and Oceanside. The Site transects the jurisdiction of the Cities of Escondido, Oceanside, San Marcos, and Vista, and the County of San Diego. The Site is regulated by the Regional Board in accordance with Order No. 99-08-DWQ. On August 7, 2003, NCTD filed a Notice of Intent (NOI) to comply with Order No. 99-08-DWQ with the State Board for the Site, and was issued Waste Discharge Identification (WDID) No. 9 37C322900.
3. As explained in more detail in the attached Technical Report, the NCTD failed to implement its Storm Water Pollution Prevention Plan (SWPPP) by failing to install and maintain adequate Best Management Practices (BMPs) in violation of Order No. 99-08-DWQ section C.2 on at least 112 days, October 5, 2007 through January 25, 2008. These violations were observed and documented during ten Regional Board inspections of the site on the following days: October 5, 2007; November 27, 2007; November 30, 2007; December 3, 2007; December 7, 2007; December 19, 2007; December 28, 2007; January 7, 2008; January 22, 2008; and January 25, 2008.
4. The inspection reports document (1) widespread lack of any BMPs when BMPs were essential as sediment discharge preventive measures; (2) widespread lack of BMP maintenance or inadequate BMPs; and (3) numerous locations where discharges to storm drains and directly to receiving waters occurred as the direct

result of either no BMPs or inadequate BMPs being in place. The inspection reports provide photo documentation of the direct connection between inadequate BMPs and sediment discharges.

5. The documented inadequate BMPs include: inadequately planned BMPs such as gravel bags not being stacked high enough to prevent sediment discharges from overtopping them; inadequately installed BMPs such as fiber rolls not being trenched in, leading to rills forming below the fiber rolls and sediment-laden water flowing through the rills; complete lack of erosion controls in some locations; and inadequately maintained BMPs such as dislodged fiber rolls and silt fences left in disrepair. Lack of sediment controls was exemplified by numerous storm drain inlets encountered during the inspection periods without any protection whatsoever.
6. It is reasonable to conclude from the documented conditions observed during the ten inspections that occurred during the period October 5, 2007, to January 25, 2008, that conditions of inadequate or failed BMPs also existed in the intervening days for a total of 112 days.

**Discharge Violations (Order No. 99-08-DWQ, Discharge Prohibition A.2)**

7. Order No. 99-08-DWQ prohibits “[d]ischarges of material other than storm water which are not otherwise authorized by an NPDES permit to a separate storm sewer system (MS4) or waters of the nation are prohibited, except as allowed in Special Provisions for Construction Activity, C.3.” (Order No. 99-08-DWQ, Discharge Prohibition A.2.)
8. During inspections, Regional Board staff observed and documented 25 unauthorized discharges of sediment to waters of the United States in violation of Water Code section 13376 and section A.2 of Order No. 99-08-DWQ on the following days and locations:

On November 30, 2007:

1. Into storm drain inlet along the east side of the tracks that parallel Tremont Street near the Oceanside Transit Center Station in the City of Oceanside. Drainage from this inlet discharges into Loma Alta Creek.
2. Into storm drain inlet in drainage channel along the east side of tracks near the Coast Highway Station in Oceanside. This drainage discharges into Loma Alta Creek.
3. Into storm drain inlet in drainage channel across from the Coast Highway Station in Oceanside. Drainage from this inlet discharges into Loma Alta Creek.
4. Into storm drain inlet along the south side of the tracks east of the Coast Highway Station in Oceanside. This drainage discharges into Loma Alta Creek.

5. Directly into Loma Alta Creek, near the Crouch Street Station in Oceanside.
6. Into storm drain inlet near Rancho Del Oro Station in Oceanside. This drainage discharges into Loma Alta Creek which traverses through this site.
7. Into storm drain inlet in the parking lot of the Escondido Avenue Station in Vista. This storm drain discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon.
8. Into storm drain inlet at the Escondido Avenue Station in Vista. This storm drain discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon.
9. Into storm drain inlet near the north boundary of the Mar Vista storage yard. This drainage discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon.
10. Into storm drain inlet at the northwestern corner of the Mar Vista storage yard. This storm drain discharges into Buena Vista Creek and downstream into Buena Vista Lagoon.
11. Into drainage channel along the south side of Palomar Station in San Marcos. This drainage discharges into a storm drain and then into San Marcos Creek and further downstream to Lake San Marcos.
12. Into storm drain inlet near the tracks at Barham Lane in San Marcos. The storm drain discharges into San Marcos Creek and further downstream to Lake San Marcos.
13. Into drainage channel along the south side of Barham Lane tracks. This drainage discharges into San Marcos Creek and further downstream to Lake San Marcos.
14. Into storm drain inlet near the Barham Lane construction area (again discharging to San Marcos Creek and further downstream to Lake San Marcos).
15. Into storm drain inlet near Shelley Circle in San Marcos. The storm drain discharges to San Marcos Creek and further downstream to Lake San Marcos.
16. From Nordahl Road discharging to an unprotected MS4 inlet in Escondido. Discharge is to San Marcos Creek and further downstream to Lake San Marcos.

On December 7, 2007:

17. Into storm drain inlet on the northeast corner of the Vista Transit Center Station. Drainage discharges into Buena Vista Creek.

On December 19, 2007:

18. Into storm drain inlet near Shelley Circle in San Marcos and further downstream to Lake San Marcos. The drainage discharges into San Marcos Creek. This is the same inlet where discharges were observed on November 30, 2007 (listed as No. 14, above).

On January 7, 2008:

19. Into storm drain inlet in the northwest corner of the Mar Vista storage yard. This storm drain discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon.
20. Into storm drain inlet at the Escondido Avenue Station in Vista. This drainage discharges into Buena Vista Creek and ultimately into Buena Vista Lagoon.
21. Into drainage channel at Melrose Station in Vista that discharges into Loma Alta Creek.
22. Directly into Loma Alta Creek at Melrose Station in Vista.
23. Directly into Loma Alta Creek on the north bank at Crouch Street Station in Oceanside.
24. Directly into Loma Alta Creek on the south bank at Crouch Street Station in Oceanside.
25. Into a storm drain inlet on the north side of the tracks at the Coast Highway Station in Oceanside. The storm drain discharges into Loma Alta Creek.

## REGULATORY CONSIDERATIONS

9. As described above, NCTD has violated provisions of Order No. 99-08-DWQ by discharging waste to surface waters and failing to implement adequate BMPs as part of their SWPPP as required under Order No. 99-08-DWQ.
10. Water Code Section 13385 subdivision (c) states in part: "Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:  
(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs."
11. For discharging sediment to surface waters in violation of Order No. 99-08-DWQ and Section 13376 of the Water Code, and for violating Provision C.2. of the Order by failing to install and maintain adequate BMPs, the Regional Board may assess administrative civil liability based on Water Code Section 13385. The maximum liability which can be imposed by the Regional Board under Water Code Section 13385 is \$10,000 per day for each violation. The Complaint alleges violations of Provision C.2. on 112 days and violation of Discharge Prohibition A.2. on 25 separate days. The maximum administrative civil liability that can be imposed for these violations is  $112 \times \$10,000$  and  $25 \times \$10,000$  for a total of \$1,370,000 (one million three hundred seventy thousand dollars).
12. Water Code Section 13385 (e) lists a number of factors to be considered in determining the amount of administrative civil liability imposed under Section 13385. This subdivision provides:




"In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation."

13. Pursuant to Water Code Section 13385 (e), the minimum civil liability is equivalent to the economic benefit accrued by the Discharge for failing to install and maintain adequate BMPs. Evidence was presented by staff to estimate the economic benefit as \$5,000 per acre per year for a total of \$1.4 million. The NCTD staff testified that it spent between \$2.5 and \$3 million to implement BMPs at the site during the October 5, 2007, through January 25, 2008, timeframe. Based on these estimates, the proposed liability recovers at least the economic benefit.
14. On March 4, 2008, the Assistant Executive Officer issued Administrative Civil Liability Complaint No. R9-2008-0021 to NCTD proposing the imposition of \$685,000 in liability for the above violations.
15. Liability in the amount of \$685,000 is based on consideration of the factors prescribed in subdivision (e) of Water Code Section 13385 as applied to the allegations contained in Complaint No. R9-2008-0021 and described in greater detail in the Complaint's Technical Report. The discussion of the factors contained in the Technical Report is incorporated by reference into this Order. The liability is as follows:
  - \$5,000 per day for failing to implement a Storm Water Pollution Prevention Plan for 112 days of violation of Order No. 99-08-DWQ Section C.2. for a total of \$560,000; and
  - \$5,000 per discharge for 25 discharges of sediment to waters of the United States in violation of Water Code Section 13376 and Order No. 99-08-DWQ Section A.2. for a total of \$125,000.
16. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code section 21000 et seq.) in accordance with section 15321, Chapter 3, Title 14, California Code of Regulations.
17. The Regional Board incurred costs totaling \$41,860, which includes investigation, preparation of enforcement documents, and communication with NCTD regarding the enforcement action.

18. Any person aggrieved by this action of the Regional Board may file a petition for review with the State Board. A petition for review must be received by the State Board's Office of the Chief Counsel within 30 days of the date of the action. Copies of the laws and regulations regarding the filing of petitions are available on the State Board's website and upon request.

**IT IS HEREBY ORDERED**, that pursuant to Section 13385 of the Water Code, that civil liability be imposed on the North County Transit District in the amount of \$685,000

I, John H. Robertus, Executive Officer, do hereby certify the foregoing is a full, true, and correct copy of an Order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region, on June 11, 2008.

  
JOHN H. ROBERTUS  
Executive Officer

May 21, 2008

ACL Complaint No. R9-2008-0021  
CA:10-3022900:fmelbourn

Dear San Diego Regional Water Board,

I am writing this letter in regards to ACL R9-2008-0021 with a proposed fine of \$685,000 against NCTD for storm water violations along the Sprinter project beginning in the fall of 2007 and continuing into 2008. The proposed fine is based upon both sediment laden storm water flows into inlets as well as BMP violations along a 22 mile project. In my opinion the fine is far too small.

I believe that the seriousness of the violations clearly warrant maximum fines for two reasons: 1) the numerous and pervasive BMP violations along a 22 mile long project being counted for only a single violation, and 2) on the one occasion (November 30, 2007) where the Water Board was lucky enough to be performing an inspection during a significant rain event, 14 violations were observed with sediment flowing into either creeks or inlets at 10 of the 14 sites inspected.

NCTD has a 22 mile construction site where they have been told numerous times to comply with the law. NCTD has repeatedly shown little interest in complying with the law and has continued to pollute the waters of the United States in four different watersheds stretching from Oceanside to Escondido.

In Inspection Report after Inspection Report, it is clear that BMP violations are common throughout much of the length of the 22 miles of the Sprinter project. Inspection Reports from January 2008 read much like Inspection Reports of November 2007 which read much like Inspection Reports of February 2007. It seems quite obvious that NCTD has complete and total contempt for the laws that protect the waters of the USA as well as the compliance promises made when NCTD obtained a permit for the construction of the Sprinter.

Prior to January 2008, despite the ongoing violations, despite repeated notices from the Water Board to NCTD, and despite the clear wording of the law and the Storm Water Permit, NCTD willfully and deliberately chose to ignore the notices from the Water Board. There is no other way to explain it!

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My understanding is that the Water Board is limited to a single daily fine of \$10,000 for BMP violations for a project site, regardless of how big or small. As proposed in the ACL, NCTD is being fined only \$5,000 per day for BMP violations. I cannot see any reason for NCTD to be given a discount or a break.

Prior to January 2008, at no point in time did NCTD demonstrate that it was sincerely interested in complying with the law. All NCTD had done was to make feeble efforts that clearly fell far short of anything remotely meeting the requirements of the law. Even after NCTD seemed to begin making real efforts at complying with the law, they somehow did not find it possible to Certify Compliance as ordered in the Cleanup and Abatement Order issued on December 31, 2007. Indeed, NCTD's stated goal of compliance by May 1, 2008 was truly pathetic as April 30<sup>th</sup> is the last day of the rainy season and thus marks the end of a great many BMP requirements.

For the Water Board to fine NCTD anything less than the maximum allowable fine sends a message out to the construction community that they can get away with the same contempt for the law. In the future, other polluters will argue to the Water Board that their action equaled or exceeded NCTD's and therefore warrant, at a minimum, the same consideration in the calculation of fines. There is absolutely no good reason for the Water Board to cut NCTD a break and many reasons for the Water Board to charge the maximum fine permitted by law.

The BMP violations are bad enough but then there are the discharges. On November 30, 2007, the Water Board staff observed 14 discharges spread among 10 of the 14 inspection sites visited that day (9 discharges were previously documented on Feb. 20, 2007 in ACL R9-2007-0093). On that same day, I visited a number of sites along the Sprinter line and documented my own observations with photographs and video clips. Bear in mind, that I was limited in what I was able to observe from the perimeter of the Sprinter project.

On November 30, 2007, I sent Water Board staff engineer, Ben Neil, eleven emails including: 1 video clip of sediment flowing into Buena Creek, 5 video clips showing sediment flowing into storm drain inlets, 1 photo of sediment laden water flowing into Alta Loma Creek, 1 video clip of sediment flowing into a gutter leading to a storm drain inlet, and 3 video clips showing flows going offsite into a gutter leading to a storm drainage channel.